

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 10-15387

SAMUEL MICHAEL KELLER

Plaintiff/Appellee,

vs.

ELECTRONIC ARTS INC.,

Defendant/Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 3:09-CV-01967-VRW
The Honorable Vaughn R. Walker

**MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S
OPENING BRIEF; DECLARATION OF ALONZO WICKERS IV**

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**MOTION FOR EXTENSION OF TIME TO FILE
APPELLANT'S OPENING BRIEF**

Pursuant to Federal Rule of Appellate Procedure 26(b), appellant Electronic Arts Inc. ("EA") respectfully moves this Court for a 90-day extension of time, from June 1, 2010 to August 30, 2010, to serve and file its Opening Brief. EA filed its Notice of Appeal on February 18, 2010, and this is EA's first request for an extension.¹

EA recently retained the law firm of Davis Wright Tremaine as its co-counsel for this appeal. *See* EA's Notice of Association of Counsel. EA's new counsel have begun to work diligently on this appeal, reviewing the voluminous record and framing the arguments for the Opening Brief. But given the number of issues presented in this case and its complex procedural history – it was filed as a class action and then consolidated with another lawsuit, and the consolidated action later was related to an earlier-filed lawsuit – EA's new counsel needs additional time to prepare the brief. *See* Wickers Decl. ¶¶ 3-4.

The extension will not prejudice appellee Samuel Michael Keller. As a threshold matter, Judge Vaughn Walker just granted a motion to relate this lawsuit

¹ Appellee's counsel declined to stipulate to an extension. Wickers Decl. ¶ 5.

to *Pecover v. Electronic Arts*, Northern District Case No. C 08-02820 VRW, and promptly vacated all currently scheduled calendar dates in *Keller*.

Moreover, EA is informed that Keller seeks to “coordinate” this appeal with another appeal arising from EA’s alleged use of an athlete’s likeness in a video game, *Brown v. Electronic Arts*, Ninth Circuit Case No. 09-56675. In that case, counsel for appellant Jim Brown advised this Court that Keller “expressly support[s]” Brown’s motion to coordinate the *Brown* and *Keller* appeals, and that Keller has “filed (or will be filing) a motion seeking identical relief[.]” *See* Brown’s 03/25/10 Motion to Coordinate This Appeal With *Keller v. Electronic Arts* at 4. Last month, this Court granted Brown a 90-day extension of time to file his opening brief, which now is due on July 6, 2010. *See* 03/19/10 Order. In light of the extension given to Brown, EA’s requested extension is reasonable.²

² In declining to agree to EA’s request for an extension, Appellee’s counsel asserted that EA’s Opening Brief should be filed at the same time as Brown’s opening brief. Regardless of whether the two appeals ultimately are coordinated, however, there is no basis for requiring identical briefing schedules in both appeals. EA notes that this Court docketed the *Brown* appeal on October 23, 2009, *four months before* it docketed this appeal. If the Court grants EA’s request, EA’s Opening Brief would trail Brown’s opening brief by less than two months.

Accordingly, EA respectfully requests that the Court grant this motion and extend EA's time to file its Opening Brief from June 1, 2010 to August 30, 2010.

RESPECTFULLY SUBMITTED this 29th day of April, 2010.

KEKER & VAN NEST LLP
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By 
Alonzo Wickers IV

Attorneys for Defendant/Appellant
ELECTRONIC ARTS INC.

DECLARATION

DECLARATION OF ALONZO WICKERS IV

I, Alonzo Wickers IV, declare:

1. I am an attorney at law licensed to practice before the courts of the State of California and before this Court. I am a partner in the law firm of Davis Wright Tremaine LLP, co-counsel of record for appellant Electronic Arts Inc. ("EA"). I make this declaration in support of EA's Motion for Extension of Time to File Appellant's Opening Brief. I have personal knowledge of the matters set forth in this declaration.

2. Appellant's Opening Brief currently is due on June 1, 2010. EA has not previously requested any extensions.

3. Concurrently with this motion, EA has filed a Notice of Association of Counsel, adding Davis Wright Tremaine LLP as its co-counsel of record for this appeal. Davis Wright Tremaine did not represent EA in the proceedings below. Our firm also represents EA in another pending appeal, *Brown v. Electronic Arts*, Ninth Circuit Case No. 09-56675.

4. Davis Wright Tremaine was retained in this matter only recently. While my colleagues and I are working diligently on the appeal, the case presents a number of legal issues and has a complicated procedural history; it was filed as a class action and then was consolidated with another lawsuit, and the consolidated action later was related to an earlier-filed

lawsuit. Given these complexities and the size of the record, an extension of time is necessary and warranted to allow our firm to review the voluminous record and to prepare the Opening Brief. EA's counsel will continue to exercise diligence, and the Opening Brief will be filed within the time requested.

5. EA's counsel contacted appellee Samuel Michael Keller's counsel regarding EA's request for an extension. Appellee's counsel declined to agree to an extension, and asserted that the opening briefs in *Brown* and *Keller* should be filed at the same time.

6. To my knowledge, the court reporter is not in default with regard to the designated transcripts.

7. No party will be prejudiced by the granting of this extension.

This declaration was executed on April 29, 2010, at Los Angeles, California. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.


Alonzo Wickers IV

9th Circuit Case Number: 10-15387

**CERTIFICATE OF SERVICE When All Case Participants are
Registered for the Appellate CM/ECF System**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 30, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature _____/s/_____

**CERTIFICATE OF SERVICE When Not All Case Participants are
Registered for the Appellate CM/ECF System**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 30, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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